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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 199

AMERICAN UNION TRANSPORT, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,

and

FEDERAL MARITIME BOARD,
Respondents,

RIVER PLATE & BRAZIL CONFERENCES, *et al.*,
Intervener-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 22, 1958

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American Union Transport, Inc., respectfully prays for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the final judgment of that court entered April 24, 1958.

A certified transcript of the record in this case is filed with this petition, in accordance with Rule 21 of the rules of this Court.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit (not yet reported) is annexed to this petition as Appendix A. It affirms an order of the Federal Maritime Board dated March 25, 1957. The opinion of the Federal Maritime Board in support of its order of March 25, 1957, is annexed to this petition as Appendix B. The material portions of the Board's opinion and order denied petitioner's claim for reparation under sections 15 and 22 of the Shipping Act, 1916 (46 U. S. C. 814, 821).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 24, 1958. The jurisdiction of this Court is invoked under section 1040 of Title 5, and section 1254 of Title 28, United States Code.

Questions Presented

1. Where the Federal Maritime Board found that ocean carriers who were members of a conference and subject to the Shipping Act unlawfully agreed to withhold (and did withhold) freight brokerage from an ocean forwarder to punish him for prior acts of competition, was not the Board required to award reparation for the forwarder's injury?

2. Where a conspiracy is organized and executed in express transgression of a statutory mandate, are the recoverable damages limited to those which flow from infringement of a contract right?

3. May the Federal Maritime Board—without notice or hearing in an adjudicatory case—retroactively outlaw

under section 16 of the Shipping Act (46 U. S. C. 815) a claim for freight brokerage which is sanctioned by the Board's prior rules and decisions and by established custom and usage of the trade?

Statutes Involved

Sections 15, 16, and 22 of the Shipping Act, 1916, (46 U. S. C. 814, 815, 821) are set forth in Appendix C hereto annexed.

Statement of the Case

(a) Prior Proceedings

This petition seeks review of an order of the Court of Appeals for the District of Columbia Circuit which affirmed an order of the Federal Maritime Board denying reparation to the petitioner for injuries sustained in consequence of a conspiracy found by the Board to be unlawful. The proceedings in which the Board's order was entered were inaugurated by complaint which petitioner filed with the Board under section 22 of the Shipping Act, 1916 (46 U. S. C. 821), alleging a violation of section 15 of the same Act (46 U. S. C. 814) by a conference of ocean carriers. The same carriers (respondents in the proceedings before the Board) intervened in the review proceedings initiated by petitioner in the Court below under 5 U. S. C. 1032. They are hereafter collectively called the Conference.

The Conference filed an answer to petitioner's complaint before the Board, and the case was heard by a hearing examiner. The hearing examiner filed a recommended decision (R. 51-76)[1] supporting petitioner with respect to all but a minor portion of its claim.

[1] Record citations are to the page numbers in the Joint Appendix which has been certified to this Court.

Exceptions to the hearing examiner's report were filed with and argued before the Board, which (a) affirmed the examiner's finding that the Conference had violated the anti-conspiracy provisions of the Shipping Act, but (b) rejected the examiner's recommendation that reparation be awarded for petitioner's damages. (The Board also ordered the Conference to desist from the practices of which petitioner complained, but that portion of the order was without effect because it related exclusively to completed transactions.)

The Board, while finding a violation of the Shipping Act, denied reparation on two grounds, both of which petitioner contests: (a) that payment of brokerage to petitioner would have constituted a violation of section 16 of the Shipping Act (46 U. S. C. 815) (Appendix B, pp. 11-12); and (b) that petitioner had not "earned" the brokerage withheld (Appendix B, pp. 12-13).

Although the Board found two violations of the Shipping Act (one by the Conference, one by petitioner), it announced that because of "want of clarity in prior Board decisions," it would not certify either violation to the Department of Justice (Appendix B, pp. 13-14), although the examiner had recommended that the conduct of the Conference (but not of petitioner) be so certified (R. 76).

(b) The Injury to Petitioner

Petitioner is engaged in the shipping business as a ship owner, charterer, and freight forwarder (R. 93-4, Appendix B, p. 3). It is not a member of the Conference.

In 1952, petitioner made an offer to the Central Railroad of Brazil to transport 120 locomotives to Brazil (R. 94-5). The Conference, on behalf of its members, also quoted a rate, which was lower than the rate petitioner had quoted.

The Central Railroad accepted the Conference rate, and later made presumptive but not conclusive designation of Lloyd Brasileiro (one of the Conference lines) to perform the transportation (R. 159-60).

The Conference lines, despite the uniformity of their rates, remained in competition with each other for the business (R. 145) and several lines solicited such business from petitioner and thereby secured bookings of locomotives for their own vessels (R. 174-6a).

Although petitioner was unsuccessful in its bid for the transportation, it was designated by the Central Railroad "as brokers" to arrange for and supervise the shipment of the locomotives (R. 155-6). In this capacity, petitioner would, by undeviating custom and usage of the trade, have ordinarily received from the carriers (Appendix A, p. 41; Appendix B, pp. 7, 9; R. 130-1) a brokerage commission of 1¼% of the freight.

In this instance, however, the Conference carriers resolved to punish petitioner for having made an offer to carry the locomotives in a trade which the Conference deemed to be peculiarly its own.[2] After learning that petitioner had been appointed broker or forwarder, the Conference chairman on June 11, 1952, called a special meeting for June 12th—

> ". . . to determine whether or not Brokerage shall be paid to American Union Transport Company, its agents, subsidiary or associated companies on the 120 Locomotives closed in Rio with the Central Railroad of Brazil for which, we are informed, the American Union Transport now has been appointed freight forwarder.

[2] The petitioner's offer to carry the locomotives as a principal was made before its designation as broker or forwarder (R. 95, 154-6) and involved no breach of any fiduciary relationship.

"In view of the fact that the American Union Transport Company and/or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage" (R. 208).[3]

The next day, the special meeting was held, at which "it was proposed that no brokerage be paid on the 120 locomotives . . ." and "on ballot vote the proposal was approved" (R. 209).

The foregoing actions were taken in secret and petitioner did not learn of them until it had occasion to submit brokerage bills covering locomotives booked with Moore-McCormack Lines and I. F. C. Lines (two of the Conference carriers) (R. 167-8). Lloyd Brasileiro had previously refused to pay, for stated reasons which made no mention of the Conference action (R. 164); but the answer in the proceeding before the Maritime Board (R. 46), as well as a considerable body of documentary proof[4] establish that the refusal of the Conference carriers to pay brokerage was the direct consequence of the Conference action of June 12, 1952 (R. 167-8, 208-9). Indeed, the Conference admitted that any forwarder who had not competed for cargo, would have received brokerage for services similar to those which petitioner rendered (R.

[3] The assertion that petitioner had undercut existing Conference rates was false (R. 146-7). There were no existing Conference rates (R. 142-4), or if there were, the Conference had unlawfully kept them secret (R. 141).

[4] Brokerage was actually paid on spare parts (R. 85-6) which moved under the same terms as the locomotives (R. 87, 146-7). The brokerage bills were audited and explicitly approved as to parts while being disapproved as to locomotives (R. 85-8, 177-9).

140).[5] The record is thus conclusive that the denial of brokerage was solely a gesture of retaliation against a competitor or potential competitor, and that its purpose was to force the competitor from the Conference sea-lanes.[6]

The Maritime Board held that even though the Conference had acted illegally, the petitioner could not recover its damages (which were claimed in the amount of brokerage denied—i. e., $11,647.12). The Court below affirmed the Board, substantially on the Board's own grounds, which, as already noted, were that brokerage would have constituted a rebate because no fee had been charged against the consignee and that in any event, brokerage was not "earned" (Appendix B, pp. 11-13).

Further facts are set forth in ensuing sections of this petition.

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[5] In its capacity as forwarder-broker, petitioner communicated with the locomotive manufacturers, obtained production schedules, made arrangements necessary to schedule the shipments (R. 156-8), made the bookings—i. e., reserved space on the Conference vessels, scheduled shipment of the locomotives (including spare parts) from inland origins to shipside, coordinated such shipments with vessel itineraries, documented shipments for export, prepared bills of lading, filed export declarations, procured certification of consular invoices, rearranged delivery schedules for the carriers' convenience when ships were delayed or rescheduled, retarded arrival of cargo at dockside when vessels were late, thereby minimizing the carriers' car-demurrage liability, and performed other activities of a related nature which served the interests and convenience of ocean carrier, shipper, and consignee (R. 79, 82-3, 99-100, 102, 106-7, 109, 111-12, 162-3, 169-70, 183-5). If these services had not been performed by a forwarder or broker, the carriers would admittedly have had to hire personnel to do the same work (R. 128). Compare *United States* v. *American Union Transport*, 327 U. S. 437, 442.

[6] The Conference chairman testified (R. 145):

> ". . . . it is not admitted that they (the Conference lines) have taken punitive action. It might have hurt a little, but we don't call that punitive."

Reasons for Granting the Writ

(a) Conflict of the Decisions Below With a Decision of This Court

On May 19th, 1958 (about a month after the decision of the Court of Appeals to which this petition relates), this Court in *Federal Maritime Board* v. *Isbrandtsen Company*, — U. S. —, 78 S. Ct. 851, considered the anti-monopoly provisions of the Shipping Act, stating (78 S. Ct. at p. 858):

> "But it must be emphasized that the freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves. The Congress in § 14 has flatly prohibited practices of conferences *which have the purpose and effect of stifling the competition of independent carriers.*" (Italics added)

The Court also noted that Congress had

> ". . . struck the balance by allowing conference arrangements passing muster under §§ 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers" (78 S. Ct. at p. 859).

The *Isbrandtsen* doctrine was neither new nor radical. It merely recognized legislative intent as expressed with uncommon precision when the Shipping Act was before Congress. Mr. Byrnes, a member of the "Alexander Committee" which sponsored the bill, explained it thus on the floor of the House (53 Cong. Rec. 8087):

> "The regulatory features of this bill are agreed to by all fair-minded men. They are designed simply to

> enable an independent shipowner to carry on his business, without having the shipping trust drive him out by discriminatory or unfair practices."

Neither the Board nor the Court below heeded this policy in their decisions; although it was brought emphatically to the attention of both tribunals.

The petitioner's claim rests on section 15 of the Shipping Act, which requires that inter-carrier agreements "controlling, regulating, preventing, or destroying competition" be filed with the Board. The Board may approve or disapprove the agreements under stated conditions, but in the absence of approval, their performance is unlawful and subject to a penalty of $1,000 a day "to be recovered by the United States in a civil action"[7] (Appendix C, p. 2).

Section 22 of the Shipping Act authorizes the filing of complaints with the Board charging violations of the Act, and demanding "reparation for the injury" caused by such violations (Appendix C, p. 3). Petitioner's complaint charged a violation of section 15, and alleged specific injury resulting from the violation. It thus fulfilled all statutory requisites.

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[7] Section 15 accords an antitrust exemption to agreements which the Board approves. In *United States* v. *American Union Transport*, 327 U. S. 437, this Court said (p. 447, note 8):

> "It should not be necessary to emphasize, in view of the statute's plain language, that, as is indicated, the exemption arises *not* upon the mere filing of the agreement, but *only after approval* by the Commission." (Italics in original)

In conformity with this pronouncement, the petitioner sought antitrust damages in a district court before prosecuting its case before the Maritime Board. The Board intervened and moved to dismiss the antitrust suit on the ground that the Board had exclusive primary jurisdiction and power to afford a full remedy. The court agreed. *American Union Transport* v. *River Plate and Brazil Conferences* (D. C. N. Y., 1954), 126 F. Supp. 91, aff'd. 222 F. 2d 369 (2d Cir., 1955).

The Board and the Court below both found that the violations had occurred as alleged, but attached no consequences to the violation. The Board's examiner had recommended (in addition to reparation) that the facts be certified to the Department of Justice for appropriate action—*i. e.*, recovery of penalties—(R. 76) but the Board explicitly set the recommendation aside.

The conjunction of the Board's refusal to enforce penalties and its denial of reparation for proven injury had the effect of obliterating any meaningful distinction between an unlawful act and a lawful one, and of defeating the basic anti-monopoly objective of a major regulatory statute. We submit that no agency, and no court reviewing agency action, is free thus to nullify a legislatively-prescribed system of regulation.

The Board refused to apply the clear mandate of section 15 because of what was found to be a countervailing precept of section 16[8] as to which the Court below observed merely that "the courts are slow to interfere with the conclusions" of regulatory agencies "when reconcilable with statutory directions" (Appendix A, p. 10). The Court, however, made no analysis of the "statutory directions" which the Maritime Board had ignored. This Court's analysis of such directions in *Isbrandtsen* shows clearly that the Shipping Act was meant to forbid what the Board and the Court below have permitted. In these circumstances, the Court below was obligated to correct the Board's legal error. Compare *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

[8] As we show hereafter (pp. 11-14), the Board's interpretation of section 16 was incorrect.

(b) The Ruling That Payment of Brokerage Would Have Violated Section 16 of the Shipping Act

In ruling that section 16 of the Shipping Act had been violated, the Board said (Appendix B, pp. 11-12):

> "As we have seen, AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation; i.e., for its services as a freight forwarder and for its services, if any, as a broker. Under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind when it stated that it shall be 'unlawful for any . . . consignee, forwarder, broker . . . knowingly and willfully, directly or indirectly, . . . by any . . . unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than rates or charges which would otherwise be applicable.' The waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means.'"

On the same point, the Court of Appeals said (Appendix A, pp. 10-11) only that

> ". . . this determination by the Board was a matter committed to it as an expert in the field and that this court should not pit its view against that of the Board."

and that

> ". . . the Board *should have* authority to distinguish between the services of a broker and those of a freight forwarder and find that, under the circumstances of this case, § 16 had been violated." (Italics added)

The Board's reasoning was wrong on many counts, none of which was even considered by the Court below beyond its uncritical observation that the Board "should have authority" to distinguish between services of a broker and services of a freight forwarder. The question is not whether the Board should have authority, but whether it *does* have such authority and exercised it within permissible limits.

The germane portion of section 16 provides:

> "SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, *knowingly and willfully*,[9] directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable." (Italics added)

It is clearly established that section 16 of the Shipping Act (and cognate provisions of the Interstate Commerce Act) are simply intended to prevent shippers, consignees, and their representatives from cheating carriers through specified types of fraudulent conduct. In *Armour Packing Co. v. United States*, 153 Fed. 1 (8th Cir., 1907), aff'd 209 U. S. 56, dealing with the Interstate Commerce Act, the Court said (p. 16):

> ". . . Obtaining transportation at a rate less than the regular published rate, without committing any

[9] It is difficult to understand how petitioner could have violated section 16 "knowingly and willfully" when the Board expressly conceded (Appendix B, pp. 13-14) such "want of clarity in prior Board decisions" that it gratuitously declined to "take any action" against petitioner. The Board's precedents hold that "knowingly and willfully" means "purposely and obstinately" and signifies intentional disregard of statutory requirements: *Misclassification of Tissue Paper*, 4 F. M. B. 483. See also *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242-3.

> fraud or making any false representation to secure it, is not unlawful under this act of 1889."

In *Beaumont Port Commission* v. *Seatrain Lines*, 3 F. M. B. 556 (1951), the Board said of the Shipping Act (p. 563):

> "'Unfair device or means', coming at the end of a list of dishonest practices such as false billing, etc., must be construed as limited to practices of the same general class as those specifically mentioned. This is the rule of 'ejusdem generis'."

Here, the consignee paid the full rate negotiated with the Conference, *whose tariff authorized the payment of brokerage* (Appendix B, p. 4; R. 28-9, 44). Petitioner perpetrated no fraud whatever; it claimed only what the Conference tariff authorized and what Conference carriers *always* paid in similar circumstances. There was no suggestion that any brokerage money, if collected, would flow into the pocket of any shipper of the cargo, or of the consignee.

The false billing provision was prefixed to section 16 by amendment in 1936. The report of the House Merchant Marine Committee on the amendatory bill (H. R. Report No. 2598 to accompany S. 3467, 74th Cong. 2d Sess.) made explicit reference to brokerage, stating (p. 2):

> "* * * Suggestions were made to add a proviso that nothing in the act shall be construed to prohibit the payment by carriers of ocean freight brokerage to a bona-fide forwarder or broker. *It is not the intent of this committee that the act shall be construed so as to prohibit the payment by carriers of legitimate brokerage, and it is not believed that the language of the new matter as now drawn could by any possibility interfere with the payment of legitimate brokerage.* It is for this reason that a proviso to that effect is not added." (Italics added)

The quoted passage shows that Congress intended to *protect* (not to outlaw) "legitimate brokerage" to freight

forwarders. The only "non-legitimate" brokerage to which Congressional attention had been directed was brokerage paid to forwarders who were affiliates or "dummies" of a shipper—in which event the brokerage would diminish the net freight which the shipper paid. See *Hearings before the Merchant Marine and Fisheries Committee*, House of Representatives, on S. 3467, 74th Cong. 2d Sess., pp. 23, 24, 28. There was no affiliation between the petitioner and the shipper or consignee of cargo in this case. It thus appears that the Board and the Court below have construed section 16 as meaning the opposite of what Congress said it meant.

The Board has sought, by a novel and unwarranted misinterpretation of section 16, to construe it as a plenary grant of authority to regulate the forwarding industry. We think it clear that no such authority exists, and that in any event, the question whether it does exist and was exercised within permissible limits merits determination by this Court.[10]

(c) The Ruling That Damages Caused by a Conspiracy May Be Recovered Only When a Contract Right Has Been Infringed

The Court of Appeals said (Appendix A, p. 11):

> "The appointment of AUT as a broker by Central could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agree-

[10] In *United States* v. *American Union Transport*, 327 U. S. 437, this Court held that freight forwarders were "other persons" as defined in section 1 of the Shipping Act (46 U. S. C. 801) and that they could be regulated under those provisions of the Shipping Act which pertained to such "other persons"—*i. e.* persons other than common carriers. The decision did not, however, indicate what activities of such "other persons" were subject to regulation.

ment by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. * * *"

This reasoning constituted one branch of the Court's bifurcate argument in support of the Board's position that brokerage had not been earned. It wholly ignores the significance of the admission in the pleadings and the overwhelming evidence that brokerage would have been paid if the conspiracy had not been organized and executed.[11] Both the Board (Appendix B, pp. 7, 9) and the Court below (Appendix A, p. 11) recognized that brokerage would have been paid but for the conspiracy. They were, therefore, rationally obligated to make the ultimate finding that the conspiracy injured the petitioner to an extent measured by the lost brokerage. But in lieu of such finding, the Court ruled that petitioner had suffered no damage because no carrier had made itself liable by contract to pay brokerage. This means that damages can be collected for injury flowing from conspiracy only where the conspirators impaired a claim existing under a contract. We are confident that no such rule exists, and that if it did exist, it would destroy the effectiveness of private remedies for damages under all antitrust statutes and similar enactments.

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[11] Paragraph 17 of the Conference answer in the proceeding stated (R. 46):

"They admit that *due to the Conference's action of June 12, 1952, the respondent lines* which transported the aforementioned 120 locomotives and parts therefor *refused and still refuse to pay brokerage to complainant* . . ." (Italics added)

The Conference chairman testified (R. 132) that forwarders render services of value to carriers and that if forwarders did not render those services, the carriers would have to employ additional personnel to render them (R. 128); that brokerage had been paid for such services "since time immemorial" at 1½% (R. 131); and that any person other than petitioner would have received brokerage for the same services which petitioner performed (R. 140).

Antitrust offenses do not result characteristically in the impairment of *contract rights*, but rather defeat the realization of ordinary commercial expectancies. When sellers combine to fix the sales price of a commodity, they do not ordinarily impair the contract rights of any purchaser, because in a typical case, the purchaser has no contract. The harm to the purchaser flows from his inability to purchase at the price he would have paid in the absence of the price fixing combination. See, for example, *American Tobacco Co.* v. *United States*, 328 U. S. 781. The damages suffered by the plaintiff sugar growers in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, were not caused by the breach of any contract, but by impairment of the prospect that the growers could have obtained better contracts if their customers had not conspired to fix uniform terms of purchase.

The concept of compensable injury should be no different under the anti-monopoly provisions of the Shipping Act than under the Sherman Act or the Clayton Act. Misconduct under the antitrust laws or any other type of anti-monopoly legislation constitutes a statutory tort. See *Farbenfabriken Bayer, A.G.* v. *Sterling Drug*, 153 F. Supp. 589 (D. C. N. J., 1957), and the relevant inquiry as to damage is (as in all other cases of tort) whether it was proximately caused by the defendant's tortious conduct. A victim knocked down by an automobile while crossing the street need not prove in a damage suit, that he was entitled *by contract* to reach the other side in safety. It is enough that he would normally have arrived intact if left alone. So here, it is enough that the petitioner would have received brokerage if the Conference had not restrained its members from paying it. Compare *Anderson* v. *Shipowners' Ass'n of Pacific Coast*, 272 U. S. 359.

It was improper, and inimical to the purposes of the Shipping Act, for the Board and the Court to erect arti-

ficial and unconventional barriers against petitioner's claim. In *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), the Court said:

> "The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." (p. 398)

It seems particularly important to give a liberal interpretation to the reparation provisions of the Shipping Act in the circumstances here presented, where the Board refuses to enforce the penal provisions of the law, with the result that it must be enforced through private damage suits or not at all.

(d) Actions of the Board and the Court Below in Derogation of the Administrative Procedure Act

We believe that the Board's conduct of this case constitutes a catalogue of important abuses which the Administrative Procedure Act (5 U. S. C. 1001 ff.) was enacted to prohibit. For example:

1. Lack of notice of legal issues

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) provides that in cases of adjudication, the parties are entitled to notice as to the nature of the hearing and "the matters of fact and law asserted." The rules of the Federal Maritime Board also provide that answers to complaints "shall give notice of issues controverted in fact or law" (46 C. F. R. 201.65).

Although the Board decided that petitioner's claim was unlawful under section 16 of the Shipping Act, the answer

filed by the Conference in the Board proceeding tendered no such issue (R. 43-8), nor did the Board.[12] Consequently, no intimation of illegality arose until after the hearings were concluded. As to this, the Court below held (Appendix A, p. 12) that "the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not."

This, of course, begs the issue. We need not deny that the Board could refuse compensation "for an illegal act." Under the Administrative Procedure Act, however, the Board could not decide that petitioner had acted illegally until petitioner had been notified that the legality of its conduct was in question[13] and until petitioner had been afforded an opportunity to contest the point.[14] See *Morgan* v. *United States*, 304 U. S. 1, 18, where this Court said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

If an issue of legality had been seasonably tendered, the germane material could have been brought to the Board's attention. Although it was briefed for the Court below, the Court failed to discuss any statute, decision, or regulation on which the case depended. It cited only two

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[12] Compare *Service* v. *Dulles*, 354 U. S. 363.

[13] Section 23 of the Shipping Act (46 U. S. C. 822) provides that orders of the Board "relating to any violation of this chapter shall be made only after full hearing . . ."

[14] It is obvious that the Board was unacquainted with the pertinent legal authorities when it wrote its opinion. For example, the legislative history of the amendment to section 16 of the Shipping Act is not mentioned. Neither are any relevant decisions of the Board or of the courts.

cases having no specific bearing on any concrete element of the controversy.

2. Retroactive Rule Making

The Board ruled (and the Court agreed without analysis of the Board's ruling) that brokerage is a rebate to a shipper, prohibited by section 16. But until this pronouncement, the Board's rule was that—

> "The payment of brokerage by the carrier is not a payment to a shipper nor does the shipper in any way benefit from the payment."

That ruling was made in 1949 by the Maritime Commission (the Board's predecessor) in *Agreements and Practices re Brokerage* (Docket No. 657), 3 U. S. M. C. 170, 172—a decision affirmed by two three-judge district courts under the Urgent Deficiencies Act: *Atlantic & Gulf/West Coast Conference* v. *United States*, 94 F. Supp. 138 (S. D. N. Y., 1950); *Pacific Westbound Conference* v. *United States*, 94 F. Supp. 649 (N. D. Calif., 1950).

While the Board's reasoning turns on the non-collection by petitioner of a fee from the cargo interests,[15] the evidence in Docket No. 657 clearly revealed the practice which the Board now condemns.[16]

Despite such evidence, the Commission held that conferences could not outlaw brokerage to forwarders. The present case is an unheralded abandonment of that ruling.

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[15] There is no suggestion as to how such a fee should be measured.

[16] The following appears at page 1256 of the record in Docket 657:

> "Q. Did Guggenheim Bros. [a shipper] compensate the broker by any payments with their own funds? A. None whatsoever.
>
> "Q. The sole compensation he derived was from brokerage paid by the steamship companies? A. That is correct."

The Board purports to find the Conference boycott illegal but under the decision, the illegality has no practical consequence and the decision has no deterrent force.

The Board has long had a published rule on brokerage (46 C. F. R. 244.13) which tells when it may and may not be paid. The rule gives no hint that the forwarder must make a charge against shipper or consignee.

In this state of the Board's rules and precedents, it is obvious that the Board's decision in this case reverses an old rule by substituting a new and different rule; and that the new rule is applied retroactively to transactions which occurred six years before the case was decided. The Board's action was arbitrary and capricious. Since the Board gave no advance notice of its intentions, the new rule is void as applied to petitioner.

Section 3 of the Administrative Procedure Act (5 U. S. C. 1002) requires Federal Register publication of "substantive rules" and "statements of general policy" adopted. Section 4 of the Administrative Procedure Act (5 U. S. C. 1003) requires advance notice of rule making by federal agencies, with opportunity for interested persons to participate in the rule making process by the submission of "written data, views, or arguments . . ." Upon final adoption of a new rule, it must be published (except in emergencies) at least 30 days ahead of its effective date. None of the procedures thus prescribed were observed in connection with the decision here involved.

The Board's action violated not only the Administrative Procedure Act, but also the rule formulated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 92:

> "But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of

conduct prescribed by an agency of government authorized to prescribe such standards . . ."

The collection of brokerage in the circumstances of this case was expressly sanctioned by the Board's existing rule and was an established trade practice (R. 131-2, 139).

The Board tacitly conceded that its decision constituted a rule making activity when, six days before issuance of its decision in this case, it published in the Federal Register (22 F. R. 1779, March 19, 1957) a *proposed* revision of its old rule on brokerage. The proposed rule includes provisions indistinguishable from those incorporated in the decision here in controversy. The new proposals, however, remain proposals only, having not yet been adopted for general application. The result is that petitioner alone is subject to the restrictions in question. So far as appears, all other forwarders are still free to receive brokerage whether or not they have collected a fee from the cargo interests. The result is discriminatory, unfair, and unlawful.

CONCLUSION

The errors above cited relate to matters of substantial public interest and importance and invite review and correction by this Court. Accordingly, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE F. GALLAND
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Counsel for Petitioner

Of Counsel:

GALLAND, KHARASCH & CALKINS

July 22, 1958

APPENDIX A

(OPINION OF THE COURT BELOW)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,866

AMERICAN UNION TRANSPORT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents,

RIVER PLATE AND BRAZIL CONFERENCES, *et al.*,

Intervenors.

On Petition to Review Order of the Federal Maritime Board

Decided April 24, 1958

Mr. GEORGE F. GALLAND, with whom Mr. WILLIAM J. LIPPMAN was on the brief, for petitioner.

Mr. EDWARD APTAKER, Chief, Regulations Branch, Federal Maritime Board, with whom Messrs. ROBERT E. MITCHELL, Assistant General Counsel, Federal Maritime Board, and DANIEL M. FRIEDMAN, Attorney, Department of Justice, were on the brief, for respondents.

Mr. ELMER C. MADDY, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of

Court, with whom Mr. Robert E. Kline was on the brief, for intervenors. Mr. Ronald A. Capone also entered an appearance for intervenors.

Before Danaher, Bastian and Burger, Circuit Judges.

Bastian, *Circuit Judge*: This is a proceeding to review an order of the Federal Maritime Board (hereinafter referred to as the Board). The order under review denied petitioner reparations for an alleged violation of § 15 of the Shipping Act of 1916.[1]

Petitioner, American Union Transport, Inc. (hereinafter referred to as AUT), is a registered freight forwarder, broker, owner and charterer of vessels, and a water carrier. River Plate and Brazil Conferences (hereinafter referred to as the Conference) is a group of steamship lines, common carriers by water between certain ports of the United States and Canada and ports in South America, including Brazil. The Conference operates pursuant to a certain agreement on file with and approved by the Board, and certain parts of that agreement, important to a consideration of this case, will be hereinafter referred to. The agreement gives the Conference power to make rates, including brokerage,[2]

[1] The provisions of §§ 15 and 16 of the Shipping Act of 1916 are attached hereto as an appendix. [See Appendix C.]

[2] The brokerage may be paid by Conference members in accordance with the following rules adopted pursuant to the basic agreements:

> "Rule 10 of the Conference Tariff No. 11: *Brokerage*. Freight brokerage not to exceed 1¼% of the amount of freight may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and general shipping public; a broker whose business is maintained directly or indirectly by a shipper or consignee for the purpose of handling his business exclusively shall not be deemed a bona fide broker; freight brokerage

subject to approval of the Board. AUT is not a member of the Conference.

Sometime in 1952 the Estrado de Ferro Central do Brazil (hereinafter called Central), an instrumentality of the Government of Brazil, purchased 120 locomotives and certain parts from American and Canadian companies. The Conference interested itself in obtaining carriage of these locomotives on Conference vessels, as did AUT. AUT's quotation was the high one and it did not get the business as a carrier, but the Conference did. Thereafter, on May 16, 1952, AUT was advised by Central that the ocean transport of the locomotives had been entrusted to Lloyd Brasileiro (hereinafter referred to as Lloyd), a steamship line member of the Conference and, like Central, an instrumentality of the Brazilian Government, and at the prices quoted by the Conference. Central's letter to AUT also contained the following language:

> "Likewise it was decided to appoint American Union Transport, Inc. as brokers in charge of negotiations and arrangements in connection with these shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central.
>
> "I already advised Lloyd Brasileiro of this appointment in my letter of May 14th and am today sending correspondence to the same effect to the manufacturers General Electric, Baldwin-Lima-Hamilton Corporation and Montreal Locomotive Works Ltd.

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shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:

> "'In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and the acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee, and that the business of the broker is in no sense subsidiary to that of the shipper or consignee.'
>
> "NOTE: At Canadian Ports 'In compliance with Section 16 of the Shipping Act, 1916' shall be deleted."

Opinion of the Court Below

> "The Central will undertake to sign the freight contract directly with Lloyd Brasileiro, but would request your cooperation in drawing up the essential clauses in contracts of that nature."

Central also notified at least one of the Conference lines of the designation.

On June 11, 1952, AUT notified Lloyd that the first two locomotives would be ready on a date specified, and advised Lloyd that brokerage will be due us at the rate of 1¼% of the freight." Upon receipt of this letter Lloyd advised AUT that the claimed brokerage would not be paid for the reason that both Central and Lloyd were departments of the Government of Brazil and were not permitted to pay brokerage on shipments consigned to Brazilian Government departments.

On June 11, 1952, the Chairman of the Conference called a special joint executive meeting thereof to be held on June 12 to determine whether or not brokerage should be paid to AUT, and this notice contained, among others, the following statement:

> "In view of the fact that the American Union Transport Company and or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage."

The minutes of this specially called meeting show that the following action was taken:

> "After discussion it was proposed that no brokerage be paid on the 120 Locomotives closed direct in Brazil with the Central Railroad of Brazil by Con-

ference representatives, and on ballot vote the proposal was approved.

"On motion, seconded and carried, meeting thereupon adjourned."

AUT continued to render services as a freight forwarder, that is, handling bills of lading, and did other acts usually performed by a freight forwarder rather than by a broker. AUT claims that it was not advised of the Conference action until October 1952,[3] when its bills to Moore-McCormack Lines were returned to AUT unpaid, with the explanation that the line could not pay due to the Conference action of June 12, 1952. However, the witness Holzer, representing AUT, testified that his company learned of the Conference action shortly after it took place, some time in June 1952. Holzer also testified:

"Q. So you were under no illusion that members of the Conference could not pay you brokerage on these locomotives under the Conference action?

"A. We felt that this action was completely unjustified, and we notified the lines that we would not accept the denial of brokerage.

"Q. But you went ahead and acted, knowing the Conference had taken this action?

"A. Certainly, we had undertaken to handle this business entrusted to us by a very important client, namely, Estrada, and even though perhaps the Conference wanted us to drop it, we couldn't do that

[3] AUT was advised by Lloyd, which carried the great bulk of the freight, on June 12, 1952, that the so-called brokerage attempted to be charged would not be paid by Lloyd on any shipments since this would mean that the Brazilian Government would be paying brokerage on shipments "they would normally handle as they have been handled in the past." There is no evidence justifying the claim that Lloyd as a matter of fact took this action as a result of the June 12, 1952 meeting. In fact the evidence is to the contrary.

because they saw fit not to pay us brokerage. But we went on record that we would demand it.

"Q. So you went ahead with this business because you felt you had an obligation to the Central Railroad who had appointed you?

"A. Yes, we had an obligation. We had undertaken to handle these 120 locomotives."

Section 15 of the Shipping Act is in fact the antitrust law for the shipping industry and no action taken by the Conference which in any way savors of what would be a violation of the Sherman Antitrust Act is proper. However, certain actions may be taken in concert by members of the Conference, if approved by the Board.

The agreement of June 12, 1952, was never filed with the Board for approval (although the minutes of the meeting were filed with the Board); and the claim of AUT is that it was therefore an invalid and unlawful agreement and in violation of § 15.

In 1954, before the present proceedings were instituted, a federal antitrust suit was filed by AUT in the United States District Court for the Southern District of New York on the ground that the action taken by the Conference on June 12, 1952, was a violation of the Sherman Act. The Conference and its member lines, and the Board, moved to dismiss this antitrust suit on the ground that the claim was within the exclusive jurisdiction of the Board. The motions to dismiss were granted on the ground stated and the complaint dismissed. On appeal to the Circuit Court of Appeals for the Second Circuit, this decision was affirmed. *American Union Transport v. River Plate and Brazil Conferences*, 222 F. 2d 369 (2d Cir. 1955).

On June 14, 1954, under § 22 of the Shipping Act, proceedings were instituted before the Board by AUT asking that the Conference agreement of June 12, 1952, be declared unlawful because it was neither filed with

nor approved by the Board, and asking reparations in the amount of $11,647.11, being the amount of the brokerage allegedly denied AUT as a result of the June 12, 1952, action. In answer the Conference contended, among other things, that § 15 of the Act had not been violated;[4] that brokerage was not in fact earned; that, as AUT had performed no service for the Conference, and had competed with the Conference for the business, it was obvious that it was not entitled to brokerage from a member of the Conference; and, further, that the Board had no jurisdiction over shipments from Canada.

The matter was referred to an examiner, who in due course held the charges to be sustained, and recommended reparations or damages in the amount of $7,330.41, being the amount which would have been due under the 1¼% brokerage formula approved in the Conference agreement[5] insofar as shipments moving from American ports were concerned, but denied reparations insofar as shipments from Canadian ports were concerned. The examiner also recommended that the fact of the violation of § 15 of the Act "be certified to the Department of Justice for institution of appropriate proceedings."

Exceptions to the examiner's report were duly filed, on behalf of both AUT and the Conference, and, after further proceedings, the Board held that there was a violation of § 15 of the Act insofar as the action of June 12, 1952, was concerned, as that action constituted an agree-

[4] Section 7 of the Conference agreement provides that the Conference at any meeting may pass upon the "ordinary routine business of the Conference," and upon any matter involving, among other things, "brokerages."

[5] Section 4 of the Conference agreement provides: "No freight brokerage shall be paid in excess of one and one-quarter percent (1¼%) on the amount of freight paid in accordance with the tariff."

ment required to be filed for approval. The Board held, however, that notwithstanding this violation AUT could not collect brokerage, because to do so would violate § 16 of the Act in that the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and was therefore an "unjust or unfair device or means." The Board also held that, apart from the indirect rebate, *brokerage* had not been earned. Brokerage, the Board held, has been defined as securing cargo for the ship.

The Board also announced in its Report and Decision that since it was desirable that a more definitive guide be established whereby Conferences may readily distinguish between routine agreements which need not be filed with the Board and those which require specific approval under § 15, a rule-making proceeding for the definition of status in such field would be initiated. It also ruled that in view of the want of clarity in prior Board decisions pertaining to both the requirement of filing of agreements under § 15 and the waiving of freight forwarding fees where brokerage is to be collected, it would not take any action against any of the parties aimed at the collection of penalties provided for in §§ 15 and 16 of the Act.

Thereupon, the present petition for review was filed by AUT, asking that the Board's order be set aside and that this court direct the Board to modify its order, or to enter a new order directing the payment of reparations to AUT in the full amount demanded by it. The Conference and its member companies have intervened.

We consider the question of whether the payment of so-called brokerage under the circumstances of this case

would have violated § 16 of the Act. The Board took the position that AUT performed no services as a broker but did perform freight forwarding services for the *consignee* without compensation therefor, intending, instead, to rely upon brokerage from the carriers for its compensation. The Board held that under this arrangement the consignee would have had property transported at less than the rate of the transportation therefor together with the cost of the incidental services in connection therewith. The Board also held that the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage fee included the cost of the freight forwarding services, and therefore constituted an unjust or unfair device or means in violation of § 16, particularly as here there had been no brokerage services as such performed by AUT.

It is perfectly obvious that AUT performed no services as a broker in the ordinary sense of the term "broker," *i.e.*, securing cargo. Far from obtaining the cargo for the Conference, AUT was in direct conflict with the Conference, and under no stretch of the imagination could it be said that AUT earned any compensation whatsoever as a broker. AUT, however, contends that, under the rather broad meaning given to the word "broker" in previous cases, that term includes "freight forwarder." It is doubtless true that, where brokerage has been earned, the broker very frequently has performed freight forwarding services as well, and without additional compensation. In this case, however, except in a few minor details, the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted.

We have no reason to disagree with the Board's holding that, of all the services performed by AUT in connection with the shipments (arranging overland transportation to shipside, coordinating manufacturers' delivery dates with steamer sailings, procuring consular invoices, customs declarations and export permits, reserving space, booking the cargo, preparing bills of lading, and advising Central when to expect shipments), only the preparing of bills of lading might be construed to be the performance of an obligation which is that of a carrier, and that that duty on the carrier arises only after the shipper, or his agent, supplies the carrier with a complete description of the goods to be shipped.

It seems clear, as the Board held, that the other functions performed by AUT could not be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers, and that the duty to bring the locomotives alongside the vessel ready for shipment is a duty of the shipper, not of the ship, and was ordinary freight forwarder service.

We believe that this determination by the Board was a matter committed to it as an expert in the field and that this court should not pit its view against that of the Board. The great complexity of our economy induced Congress to place the regulation of businesses like foreign shipments in specialized agencies with broad powers. The courts are slow to interfere with the conclusions of such agencies when reconcilable with statutory directions. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Unemployment Comm'n.* v. *Aragon*, 329 U.S. 143 (1946).

We think the conclusions of the Board in this case are reconcilable with the statutory directions. Certainly it is true that the Board should have authority to distinguish between the services of a broker and those of a

freight forwarder and find that, under the circumstances of this case, § 16 had been violated.

The appointment of AUT as a broker by Central could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. AUT was not the broker for the carriers to obtain the contract and there was no agreement, at any time between AUT and the members of the Conference to pay brokerage. Everything is to the contrary and AUT was promptly put on notice that the carriers would not pay. Nevertheless, having this notice, AUT elected to proceed. It did so at its own risk. It seems clear also that the selection of the carriers was made by Central and not AUT, as Central reserved the right to designate the carrier.

Even if it be true that the Conference has heretofore paid brokerage wherever the broker forwarder was "identified with the cargo," no reason exists why the Board, under its broad power, should not have authority to distinguish between the services of a broker and those of a freight forwarder.[6] We therefore hold that the Board

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[6] It seems perfectly clear, as held by both the examiner and the Board, that the action of the Conference at the June 12, 1952 meeting, without its submission to and approval by the Board, was a violation of § 15 of the Act. The Conference vote, it may plausibly be argued, reflected an agreement designed to punish AUT for its action in bidding against the Conference. The Conference members, prior to the June 12, 1952, meeting, had paid brokerage to forwarder-brokers where such persons had been merely "identified with the cargo," and the action of that date was obviously a modification of an existing agreement and required under § 15 to be filed with the Board for approval before becoming effective. See *Pacific Westbound Conference* v. *Local & Co.*, 269 P. 2d 541 (Ore. 1954).

committed no error in holding that no reparations were payable to AUT under the circumstances of this case.

Obviously, even in the case of a violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of.

The above disposition of the case makes it unnecessary to reach the question of jurisdiction of the Board over shipments originating in Canada.

We are of opinion also that there is no merit in appellant's claim that the Board's decision and order are procedurally invalid. If the Board held, as it did, that the collection of brokerage, so-called, under the circumstances of this case, would violate § 16, the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not. In addition, we are unable to say that the issue in question was not called to the attention of the Board.

The order of the Federal Maritime Board is

Affirmed

[Appendix omitted.]

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958.

No. 13,866

AMERICAN UNION TRANSPORT, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and FEDERAL MARITIME BOARD,

Respondents.

On Petition to Review Order of the Federal Maritime Board.

Before: DANAHER, BASTIAN and BURGER, *Circuit Judges*.

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the said Federal Maritime Board on review in this case be, and it is hereby, affirmed.

Dated: Apr 24 1958

Per Circuit Judge BASTIAN.

Filed Apr 24 1958

JOSEPH D. STEWART
Clerk

APPENDIX B

(REPORT AND ORDER OF THE BOARD)

SERVED
Mar 27 1957
FEDERAL MARITIME BOARD

FEDERAL MARITIME BOARD

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES
(And the Member Lines thereof)

Submitted January 30, 1957 Decided March 25, 1957

Respondents found to have violated provisions of section 15 of the Shipping Act, 1916, as amended, in failing to file with the Board for approval and in effectuating an agreement prohibiting the payment of brokerage on locomotives shipped from New York, N. Y. to Rio de Janeiro, Brazil.

Complainant found not entitled to reparations as brokerage was not earned by complainant, and such payment would result in an indirect rebate to the consignee in violation of section 16 of the Shipping Act, 1916, as amended.

GEORGE F. GALLAND and WILLIAM J. LIPPMAN for complainant.

ELMER C. MADDY and GEORGE F. FOLEY, for respondents.

Report of the Board

(Clarence G. Morse, Chairman, Ben H. Guill, Vice Chairman, Thomas E. Stakem, Jr., Member)

This case arises out of a complaint filed under section 22 of the Shipping Act, 1916, as amended, (the Act), by American Union Transport, Inc. (herein "AUT"), against River Plate & Brazil Conference and the member lines thereof[1] (herein the "Conference"), alleging that the Conference adopted an agreement on June 12, 1952, neither filed with, nor approved by, the Board in violation of section 15[2] of the Act, pursuant to which brokerage otherwise earned by AUT was withheld by the Conference. Reparations in the amount of brokerage withheld are demanded by AUT. The Conference contends that it did not violate section 15 of the Act, as alleged, that the payment of brokerage here would have resulted in a violation of section 16 of the Act, that brokerage was not, in fact,

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[1] The Booth Steamship Company, Limited; Brodin Line (Joint Service of Rederiaktiebolaget Disa; Rederiaktiebolaget Poseidon; Angfartygsaktiebolaget Tirfing); Cia. Argentina de Navegacion Dodero, A. A.; Dampskibsselskabet Torm (Torm Line); Flota Mercante Del Estado; Holland Interamerica Line (Joint Service of N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn"; Van Nievelt, Goudriaan & Co's Stoomvaart Maatschappij N. V.; International Freighting Corporation, Inc. (I. F. C. Lines); Ivaran Lines (Joint Service of A S Lise; Aktieselskapet Ivarans Rederi; A. S. Besco; Skibsaktieselskapet Igadi); Lamport & Holt Line, Ltd.; Lloyd Brasileiro (Patrimonio Nacional); Mississippi Shipping Company, Inc. (Delta Line); Moore-McCormack Lines, Inc. (American Republics Line); The Northern Pan-America Line, A/S; Norton Line (Joint Service of Rederiaktiebolaget Svenska Lloyd; Stockholms Rederiaktiebolaget Svea; Rederiaktiebolaget Fredrika; Southern Cross Line (Joint Service of A/S J. Ludwig Mowinckels Rederi; Westfal-Larsen & Co., A/S).

[2] Section 15 (46 U. S. C. A. 814), is attached. [See Appendix C.]

earned, and that AUT had directly competed with the Respondent for the very business upon which it now demands brokerage thereby negating any claim which AUT may have had for the brokerage.

This same controversy was initiated as an anti-trust suit in the United States District Court for the Southern District of New York. It was there dismissed on the ground that this Board had primary exclusive jurisdiction, *American Union Transport, Inc. v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (1954), and the dismissal was affirmed by the United States Court of Appeals, 222 F. 2d 369, (C. C. A. 2d 1955).

Hearings were held before an examiner who served his Recommended Decision on October 25, 1956. Exceptions were filed by AUT and the Conference, and oral argument was made to the Board thereon on January 30, 1957.

The Facts

AUT is a registered freight forwarder, a broker, owner and charterer of vessels, and a water carrier. The Conference, a group of steamship lines, are common carriers by water between ports of the United States and Canada (save the Pacific coast of the United States and Canada, and Newfoundland) and ports in Uruguay, Paraguay, Argentina and Brazil.

The Conference operates pursuant to Agreement No. 59, on file with, and approved by, the Board. This agreement provides in part:

> "4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.
>
> . . . . .
>
> 7. The members of each Conference, . . . shall, at any meeting of the Conference, consider and pass upon

> the ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages . . . governing south bound transportation . . ."

and Rule 10 of Respondent's Tariff No. 11 provides:

> "*Brokerage*:
>
> Freight brokerage . . . may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public, . . . freight brokerage shall be paid only on the following understanding which shall be written or stamped on all brokerage bills:
>
> > "In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee, and that the business of the broker is in no sense subsidiary to *that of the shipper or consignee* . . ."

The Estrado de Ferro Central do Brazil (herein "Central"), an instrumentality of the Government of Brazil, purchased 120 locomotives and spare parts therefor from the Baldwin-Lima-Hamilton Corporation, the International General Electric Company, and the Montreal Locomotive Works, Ltd. The general agent of Lloyd Brasileiro (herein "Lloyd"), a member of the Conference and a Respondent herein, another instrumentality of the Brazilian Government, acted as Central's fiscal agent in the transaction. Upon learning of the purchase, both AUT and the Conference attempted to secure the business of transporting the locomotives. Each was aware that the other was competing for the business but neither was aware of the rates quoted by the other. The rates offered by the Conference were accepted by Central.

On May 7, 1952, the Conference quoted rates to Central, applicable only where "(1)he Conference will receive the

contract for transportation of the total of 120 locomotives."[3] On May 13, 1952, Lloyd advised Central it would "undertake transportation of the locomotives purchased by your railroad . . . in accordance with the . . . [offer] laid down in the letter of 7th inst. from the same Conference." On May 14, 1952, Lloyd was "entrusted with the transportation of the 120 Diesel-electric locomotives . . . at the freight rates submitted in the letter of the Freight Conference . . . ." This letter also advised Lloyd that Central (the consignee) had decided to appoint AUT as "its broker" in charge of arranging the shipments.

On May 16, 1952, Central advised AUT that it had decided "to entrust Ocean Transportation of the 120 diesel electric locomotives under construction in the States and Canada for the Central to Lloyd Brasileiro as members of the Freight Conference and at the price quoted to this railroad in a letter of seventh instant by the Conference. *Likewise it was decided to appoint American Union Transport Inc.*, as broker in charge of negotiation and arrangement in connection with the shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central."

Thus all the locomotives were to move via Conference vessels pursuant to the understanding between Central and the Conference, and all arrangements for their shipment were to be handled by AUT without any charge to Central therefor, pursuant to the understanding between Central and AUT.

Subsequent to the letters above mentioned but prior to the time any of the locomotives were shipped, the Conference, at a Special Joint Executive Meeting on June 12, 1952, considered whether or not brokerage should be paid on the locomotives, and in view of the fact that AUT had

[3] No mention is made therein as to the spare parts.

competed with the Conference for this business, and since the business was closed with Central by the Conference directly, concluded that no brokerage would be payable to AUT on these locomotives. This action[4] dated June 12, 1952, was not filed with the Board for approval.

AUT was not advised of this Conference action until its bills for brokerage to Moore-McCormack Lines were returned to AUT, unpaid, on October 14, 1952, with the explanation that the line could not pay it due to the Conference action of June 12, 1952. AUT protested the action to the Conference Chairman who replied that the

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[4] On June 11, 1952, the Conference Chairman advised all members:

> "A Special Joint Executive meeting of the Conference is called for 2:30 P.M., THURSDAY, June 12th to determine whether or not Brokerage shall be paid to American Union Transport Company, subsidiary, or associated companies on the 120 Locomotives closed in Rio with the Central Railroad of Brazil for which, we are informed, the American Union Transport now has been appointed freight forwarder.'
>
> "In view of the fact that the American Union Transport Company and/or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage."

The minutes of this meeting as signed by the Chairman reveal:

> "The Chair advised this meeting had been called to consider whether or not brokerage should be paid on the 120 Locomotives closed for account of Conference members by direct negotiation of Conference representatives with the Central Railroad of Brazil.
>
> "After discussion it was proposed that no brokerage be paid on the 120 Locomotives closed direct in Brazil with the Central Railroad of Brazil by Conference representatives, and on ballot vote the proposal was approved.
>
> "On motion, seconded and carried, the meeting thereupon adjourned."

record failed to show that AUT rendered any services to merit brokerage.

All the locomotives which were shipped out of New York moved via Lloyd vessels and the shipments out of Montreal, Canada, were carried by Moore-McCormack Lines, Lamport-Holt, Inc., and International Freighting Corporation, all Conference members.

Central purchased spare parts for the locomotives from the manufacturers which were shipped along with the locomotives. Brokerage on these spare parts was paid by the lines in some, but not all, instances.

Pursuant to its understanding with Central, AUT as freight forwarder coordinated the manufacturer's delivery dates with the Conference's sailing schedules, supervised overland transportation from the manufacturer to the carrier, reserved space, made actual bookings, prepared bills of lading, documented shipments for export, arranged for certification of consular invoices, delayed overland transportation where necessary to avoid railroad demurrage, and prepared export declarations.

In accordance with the directions of Central, AUT booked all of the locomotives which moved out of New York on Lloyd vessels. On the Montreal shipments, AUT advised Central of the availability of vessels, but the record fails to show that in any instance the actual designation of a carrier was made by AUT; on the contrary, it is clear that Central reserved to itself the right to designate the vessel.[5]

The record clearly establishes that the Respondents have been content in the past to pay brokerage wherever the forwarder-broker was merely "identified with the cargo."

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[5] By letter of August 5, 1952, Central advised AUT that in the event Lloyd had no vessel available, AUT was to advise Central of available Conference vessels after which "a reply will be promptly sent to you, authorizing or not the shipment on the reported vessel; . . ."

Findings and Recommendations of the Examiner

The examiner concluded that (1) the June 12, 1952, action of the Conference was an agreement within the meaning of section 15 of the Act, which was not filed with nor approved by the Board, and that in executing the terms of the agreement, the Conference violated section 15 of the Act; (2) AUT earned brokerage on the locomotives and parts shipped out of New York; (3) that the refusal of Lloyd to pay brokerage was not in the exercise of its own managerial discretion; and (4) the transportation of the locomotives and spare parts from Montreal to Rio de Janeiro was not within the Board's jurisdiction.

The examiner also recommended that the Board order the Conference to pay AUT reparations in the amount of $7,330.41, with interest, and that the fact of violation of section 15 be referred to the Department of Justice for appropriate action.

Exceptions

AUT excepted to the examiner's conclusion that the Board was without jurisdiction as to the shipments originating in Montreal on the ground that the Conference's basic agreement, as approved, pertained to Canadian as well as United States ports, and further, that the wrongful act—the effectuation of the unfiled section 15 agreement—occurred within the jurisdiction of the Board and only the damages flowing therefrom occurred in Canada. AUT also claims that both the Board and Respondents are estopped from asserting that we have no jurisdiction over the Canadian shipments in view of the positions

taken by the Board and the Conference when this matter was argued before the Courts.[6]

Respondents contend that (1) their action of June 12, 1952, was within the scope of their approved basic agreement, (2) AUT forfeited any right to brokerage by acting contrary to the best interests of the Conference when it competed, as a carrier, with the Conference for the business in the first instance, and (3) AUT is not entitled to brokerage on the carryings made by Lloyd because in refusing to pay the brokerage, Lloyd was merely exercising its own independent managerial discretion.

Discussion and Conclusions

We first inquire whether the Conference action of June 12, 1952 constituted an agreement, or a modification of an agreement, required to be filed with the Board for approval prior to its effectuation under section 15 of the Act, or whether it was merely a routine action taken within the scope of the basic agreement. While it is true that the Conference's Tariff Rule permits the member lines to pay brokerage—when earned—at their discretion, historically the Respondents have been paying brokerage to forwarder-brokers where such person has merely been "identified with the cargo." The Conference action of June 12 thus amounted to a new course of conduct for its members in relation to the payment of brokerage, i. e., it prohibited the payment of brokerage regarding specified shipments. It represents therefore a modification of an existing agreement which, because it was

[6] Both the Board and Respondents there argued that the matters set forth in the complaint were within the exclusive primary jurisdiction of the Board, but the complaint merely alleged that the locomotives were "shipped from North Atlantic ports to Brazil" and there was nothing before the Court to indicate that any of the shipments originated in Canada.

calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential or cooperative working arrangement, was required to be filed under section 15 of the Act with the Board for approval prior to its effectuation.

Although we indicated in *Agreements and Practices re Brokerage*,[7] 3 U. S. M. C. 170 (1949), (herein Docket No. 657), that we would not object to the establishment by Conferences of reasonable rules and regulations preventing the payment of brokerage which would be in violation of the Act, we neither intended to grant, nor could we grant, advance approval of a rule or regulation concerning the payment of brokerage directed solely at one forwarder-broker or particular shipment. Had the Conference action of June 12, 1952, been one of general and prospective applicability and by its terms designed to prohibit the payment of brokerage which would be in violation of the Act, it would have fallen within the meaning of our language in Docket No. 657, but that issue is not presented here. We note that the approved basic agreement authorized Respondents to "consider and pass upon . . . any matter involving . . . brokerages." Approval of that language did not constitute a "cover of authority" under which any future agreements by Respondents concerning brokerage were given prior approval. Compare *Isbrandtsen v. United States*, 211 F. 2d 51 (1954).

Since this action did constitute an agreement or a modification of an agreement, required to be filed for approval and since it was not filed and was effectuated by the Respondents, section 15 of the Act was violated.

[7] "Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules and regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition on the amounts which they may pay."

In *Pacific Westbound Conference et al. v. Leval & Co., Inc.*, 269 P. 2d 541 (1954) the Supreme Court of Oregon said:

> "Section 814 of Title 46 U. S. C. A., [section 15 of the Act], hereinbefore set out, provides that the term 'agreement' as used in the Act includes 'understandings' and 'other arrangements', and that all agreements, modifications or cancellations made subsequent to the organization of the Commission under the Act *shall be lawful only when approved by the Commission and that it shall be unlawful directly or indirectly, to carry out any agreement or understanding or practice until approved.*" (Italics in original.)

See also *Isbrandtsen v. U. S., supra* and *River Plate and Brazil Conference, et al. v. Pressed Steel Car Company, Inc.*, 124 F. Supp. 99 (1954). Whether or not we would approve a similar agreement if it had general, prospective application we need not here decide.

We next consider whether the payment of brokerage to AUT by the Conference would have been in violation of section 16 of the Act.[8] As we have seen, AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation, i. e., for its services as a freight forwarder and for its services, if any, as a broker. Under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind when it stated that it shall be "unlawful for any . . . consignee, forwarder, broker . . . knowingly and willfully, directly or indirectly, . . . by any . . . unjust or unfair device or means to obtain or attempt to obtain transportation by

[8] Section 16 of the Act (46 U. S. C. A. 815) is attached. [See Appendix C.]

water for property at less than rates or charges which would otherwise be applicable."[9] The waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an "unjust or unfair device or means."

Since on this record it is clear that AUT performed services for Central gratis, and expected compensation therefor from the carriers in the nature of brokerage payments, the payment of such brokerage to AUT would have resulted in an indirect rebate to Central, which we could not permit. Even if brokerage was otherwise recoverable we would not order it paid where such payment would countenance a violation of section 16 of the Act and thus be illegal. In *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1922), the Supreme Court denied the award of treble damages to a shipper on the theory that such an award "might, like a rebate, operate to give him a preference over his competitors." See also *Terminal Warehouse Co.* v. *Penna. R. Co.*, 297 U. S. 511 (1935). The fact that the consignee here was a government agency has no bearing on the issue. We find nothing in the Shipping Act which exempts from the provisions of section 16 any designated shipper or class of shippers. Although the provisions of section 16 prohibit the payment of brokerage in this case, brokerage could not be recovered here, section 16 notwithstanding, simply because brokerage was not earned. Brokerage has been defined as securing cargo for the ship. *Agreement No. 7790*, 2 U. S. M. C. 775 (1946). Clearly, on this record, AUT did not secure the cargo for the ship. On the con-

[9] Section 16 of the Act (46 U. S. C. A. 815) is attached. [See Appendix G.]

trary, it is apparent that the transportation was sold directly by the Conference to Central, and that Central reserved to itself the right to select the individual carrier in every instance. Of all the services performed by AUT in connection with these shipments—arranging overland transportation to shipside, coordinating manufacturer's delivery dates with steamer sailings, procuring consular invoices, customs declarations and export permits, reserving space, booking the cargo, preparing bills of lading, and advising Central when to expect shipments—only the preparing of bills of lading may be construed to be the performance of a duty which is the carrier's, and that duty on the carrier arises only after the shipper, or his agent, supplies the carrier with a complete description of the goods to be shipped. The other functions performed by Complainant cannot be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers. The duty to bring the locomotives alongside the vessel, ready for shipment, is a duty of the shipper, not the ship. They were ordinary freight forwarder services. We must conclude therefore, that brokerage was not earned by AUT with regard to any of these locomotives.

However, as we stated in *Agreement and Practices Pertaining to Brokerage—Pacific Coast European Conference*, Docket No. 767, November 30, 1955, since it is desirable that a more definitive guide be established whereby Conferences may readily distinguish between routine agreements which need not be filed with the Board and those which require specific approval under section 15, a rule-making proceeding for the definition of such agreement will be initiated.[3]

In view of the want of clarity in prior Board decisions pertaining to both the requirement of filing of agreements

under section 15 and the waiving of freight forwarding fees where brokerage is to be collected, we shall not take any action against any of the parties herein aimed at the collection of penalties provided for in section 15 and 16 of the Act.

As to AUT's claim for reparations in the amount of brokerage withheld by the Respondents on the spare parts, without considering whether section 16 would prohibit an award, we find and conclude that AUT has failed to prove that it is entitled to such payment by reason of having secured such cargoes for the vessels.

In view of the foregoing we find it unnecessary to discuss Respondent's contention that AUT forfeited any claim it may have had to brokerage by competing with the Conference initially contrary to the Conference's best interest.

Although what we have said above obviates decision or comment on the contention of complainant that we are now estopped from declaring that we have no jurisdiction over shipments originating in Canada destined for South America, we wish to point out that this agency's jurisdiction is as set out in statute, and we cannot, by our own act or omission, enlarge, or divest ourselves of, that statutory jurisdiction.

Other contentions and arguments advanced by the parties have been considered but have not been specifically mentioned as they do not affect the foregoing conclusion.

An appropriate order will be entered.

By the Board.

/s/ JAMES L. PIMPER
James L. Pimper
Secretary

[Appendix Omitted]

Order of the Board

(SERVED)
(March 28, 1957)
(FEDERAL MARITIME BOARD)

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 25th day of March A. D. 1957.

No. 758

AMERICAN UNION TRANSPORT, INC.

v.

RIVER PLATE & BRAZIL CONFERENCES
(And the Member Lines thereof).

These matters being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board having made and entered of record its report, which report is hereby referred to and made a part hereof:

It is ordered, That respondents River Plate & Brazil Conferences and the member lines thereof be, and they are

hereby, notified and required to hereafter abstain from concerted action herein found to be in violation of section 15 of the Shipping Act, 1916, as amended;

It is further ordered, That the request of American Union Transport, Inc. for the award of reparations be, and it is hereby, denied; and

It is further ordered, That these proceedings be, and they are hereby, discontinued.

By the Board.

/s/ JAMES L. PIMPER
James L. Pimper
Secretary

APPENDIX C

STATUTES INVOLVED

Shipping Act.

Section 15 (46 U. S. C. 814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provision of the Act approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Section 16 (46 U. S. C. 815):

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

* * * * *

Section 22 (46 U. S. C. 821):

That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby.

The board shall furnish a copy of the complaint to such carrier or other person, who shall within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

The board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violation of this Act.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 199

AMERICAN UNION TRANSPORT, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL MARITIME BOARD,
Respondents,

RIVER PLACE & BRAZIL CONFERENCES,
(and the member lines thereof),
Intervener-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF INTERVENER-RESPONDENTS IN OPPOSITION.

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Of Counsel:
KIRLIN, CAMPBELL & KEATING.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF INTERVENER-RESPONDENTS IN OPPOSITION.

Intervener-respondents, River Plate and Brazil Conferences, *et al.* submit this brief in opposition to the granting of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, to review the final judgment of that Court entered on April 24, 1958 in the above entitled action.

Opinions Below and Jurisdiction.

The opinions below and jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

At a pre-hearing conference before the Court of Appeals for the District of Columbia, the parties to this litigation agreed that the following questions were issues in this case:

1. Was the Board's ruling that the payment of brokerage to petitioner would result in an indirect rebate to the consignee of the cargo in violation of section 16 of the Shipping Act, erroneous either as a matter of substitutive or procedural law?

2. Where petitioner has performed freight forwarding services for a consignee free of charge, may it lawfully collect a brokerage fee from the carrier for any services performed by petitioner in connection with such forwarding?

3. (a) Did the Board have jurisdiction to decide whether brokerage was earned by petitioner?

(b) If so, did the Board err in holding that brokerage had not been earned?

Just as before the Court below the issue before this Court would be the validity of an order of the Federal Maritime Board denying reparation because the brokerage being claimed by American Union Transport, Inc. (sometimes referred to as AUT) was not earned and because such payment would result in an indirect rebate to the consignee in violation of section 16 of the Shipping Act, 1916.

Statutes Involved.

As set forth in the petition, sections 15, 16 and 22 of the Shipping Act, 1916 (46 U. S. C. 814, 815, 821), are the statutes involved in this proceeding.

Statement of the Case.

The petitioner, AUT, engages in various businesses. It owns steamships, charters vessels, acts as a water carrier, is a freight forwarder registered with the Board and acts as a broker in some transactions (R. 27, 93-94). Intervener-respondent, the River Plate and Brazil Conferences and the member lines,[1] were respondents in the proceeding before the Board and the parties from which AUT seeks reparation. The Conference is a group of steamship line common carriers operating between certain ports of the United States and Canada and ports in Brazil, Uruguay, Paraguay, and Argentina (R. 43). The Conference operates under an agreement which has been approved pursuant to

---

[1] The members of the River Plate and Brazil Conferences which have intervened in this action are: The Booth Steamship Company, Limited, Rederiaktiebolaget Disa, Dederiaktiebolaget Poseidon, Angfartygsaaktiebolaget Tirfing, Cia. Argentina de Navegacion Dodero, S. A., Dampskibsselskabet Torm, Flota Mercante del Estado, N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", Van Nievelt, Goudriaan & Co's. Stoomvaart-Maatschappij N. V., A/S Lise, Aktieselskapte Ivarans Rederi, Skibsaktieselskapet Igadi, Lamport & Holt Line, Ltd., Lloyd Brasileiro (Patrimonio Nacional), Mississippi Shipping Company, Inc., Moore-McCormack Lines, Inc., The Northern Pan-American Line, A/S, Rederiaktiebolaget Svenska Lloyd, Stockholm Rederiaktiebolaget Svea, Rederiaktiebolaget Fredrika, A/S J. Ludwig Mowinckels Rederi, and Westfal-Larsen & Co., A/S.

The foregoing intervener-respondents are all of the respondents in the proceeding before the Federal Maritime Board, except International Freighting Corporation, Inc. and A. S. Besco, which are no longer members of the Conference.

the terms of section 16 of the Shipping Act, 1916 (R. 3-4). This agreement provides in part as follows:

> "4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.
>
> * * * * * * *
>
> "7. The members of each Conference * * * shall, at any meeting of the Conference consider and pass upon ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages * * * governing south bound transportation * * *".

The freight tariff issued pursuant to the basic conference agreement provides as follows:

> "Brokerage
>
> Freight brokerage * * * may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public".

In the early part of 1952 Estrado de Ferro Central do Brasil (hereinafter referred to as the Central or Central Railroad) a part of the Ministry of Transportation of the Department of Public Works of the Brazilian Government purchased 120 railroad locomotives and spare parts from certain American and Canadian Companies. The Conference learned of the shipment to be made of the 120 locomotives and parts and instructed their representative in Brazil to negotiate directly with the Central Railroad on the question of rates in an endeavor to secure the business. The Conference was successful in obtaining the business over the competition offered by AUT, who also attempted to obtain the business as a carrier.

By letter dated May 16, 1952, Central advised AUT that it had decided to entrust the ocean transportation of the 120 locomotives to Lloyd Brasileiro, a member of the Conference and also an instrumentality of the Brazilian government, at prices quoted by the Conference. In addition the letter purported to appoint AUT broker in connection with the shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central for services rendered to it by AUT (R. 155).

The first locomotives to be shipped were carried by vessels of Lloyd Brasileiro. By letter dated June 11, 1952 AUT notified Lloyd Brasileiro that brokerage would be due from it at the rate of 1¼% on the two locomotives being shipped. Lloyd Brasileiro immediately replied by letter on June 12, 1952, advising that it would not pay brokerage on any of the shipment because both the Central Railroad of Brazil and Lloyd Brasileiro were Departments of the Ministry of Transportation of the Brazilian Government and Lloyd was not permitted to pay brokerage on such shipment in view of the fact that Lloyd would normally handle such shipments in any event (R. 164).

The Conference at a meeting on June 12, 1952, considered the question of whether or not brokerage should be paid on the freight for the locomotives in view of the fact that AUT had competed with the Conference for the business and the business was obtained by the Conference lines directly from the Central Railroad. The Conference lines at that meeting determine that no brokerage should be paid to AUT on the freight paid for the shipments of these locomotives (R. 208, 209).

This action of the Conference was not submitted to the Federal Maritime Board for its approval under section 15 of the Shipping Act, but the minutes of the meeting at which this action was taken were filed with the Board in

accordance with the usual Conference procedure (R. 210). The Conference lines considered that the Conference agreement permitting them to pass upon "any matter involving * * * brokerages * * *" provided the necessary authority for their decision without requiring such action to be separately submitted to the Federal Maritime Board for approval.

Shortly after the Conference action was taken, AUT learned of the Conference position. Nevertheless, AUT continued to render services as a freight forwarder in connection with the shipments. It did so because of its undertaking to handle these shipments on behalf of the Central Railroad even though it knew the Conference lines would refuse to pay brokerage (R. 111).

ARGUMENT

CERTIORARI SHOULD BE DENIED IN THIS CASE FOR THE FOLLOWING REASONS:

I.

THERE IS NO CONFLICT OF DECISION

American Union Transport asserts, as a ground for the granting of ceriorari in this case, that the decision of the Court of Appeals is in conflict with the decision of this Court, in *Federal Maritime Board* v. *Isbrandtsen Co.*, 78 S. Ct. 851. Reliance is placed on the language in the Court's decision pointing out that section 14 of the Shipping Act prohibits "practices of conferences which have the purpose and effect of stifling the competition of independent carriers."

In the *Isbrandtsen* case, *supra,* this Court held that inasmuch as the Federal Maritime Board had determined that the dual-rate contract of the Conference was "a necessary competitive measure * * * to meet the competition of

Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade" such contract constituted a "'resort to other discriminating or unfair methods' to stifle outside competition in violation of Section 14 Third."

Petitioner at page 3 specifically sets forth the statutes involved in this case and refers only to Sections 15, 16 and 22 of the Shipping Act, 1916. There is no question that Section 14 is not involved in this case. The Court's decision in the *Isbrandtsen* case, *supra*, was based upon an interpretation of Section 14, Third of the Shipping Act, 1916. In the instant case AUT sought relief as a broker and not as a steamship carrier (Complaint R. 2742). Thus this Court's decision in the *Isbrandtsen* case, *supra*, has no application to this case.

II.

The Decision Below is Clearly Correct

A. The payment of so-called brokerage under the circumstances of this case would have violated Section 16 of the Shipping Act, 1916.

It was specifically admitted by the President of American Union Transport, in his testimony in this case before the Examiner, that American Union Transport waived the collection of any forwarding fee from the Central Railroad of Brazil and sought to be compensated for its services rendered to the Central Railroad by collecting brokerage from the steamship lines who carried the locomotives. Mr. Holzer testified as follows (R. 97, 98):

> "Q. (Mr. Maddy) Mr. Holzer, in connection with these 120 locomotives, did you charge the Central Railroad of Brazil a forwarding fee? A. We did not.

"Q. Why didn't you charge them a forwarding fee?

* * * * * *

A. (Mr. Holzer) Well, there are two reasons for it: the principal reason is that we rarely, if ever, have charged a handling fee on shipments that were entrusted to us by any Government agency, be it this one or any other foreign or United States Government agency. U. S. Government shipments entrusted to forwarders are always free of forwarding fees, or usually are.

"The second reason is that we would have had to have an understanding with the principal as to such a charge, which we did not have.

"Q. What was your understanding with your principal in that regard? A. We were not to charge any fee. We had an understanding to that effect.

"Q. You had that explicit understanding? A. That is right.

"Q. Weren't you performing a service for Central in connection with forwarding these locomotives? A. Yes.

"Q. Yet you did not charge them for it? A. No, we did not.

"Q. Now, how did you expect to be compensated for this service which you rendered to the Central Railroad? A. By the brokerage from the lines."

Based upon the admitted waiving of the forwarding fee, the Federal Maritime Board found that "AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation" and that "under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith" (R. 11).

According to the Board this was "the evil which Congress had in mind when it stated that it shall be 'unlawful for any * * * consignee, forwarder, broker, * * * knowingly and wilfully, directly or indirectly, * * * by an * * * unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than rates or charges which would otherwise be applicable'." (R. 11). The Board held that it would not order brokerage paid in any event because "the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to he consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means'." Under the circumstances therefore the Board found that the awarding of reparation in the form of brokerage would be in violation of Section 16 of the Shipping Act, 1916.

The Court of Appeals affirmed the decision of the Federal Maritime Board on this point, as well as on other grounds. The Court of Appeals held that, "in this case, however, except in a few minor details, the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted". (Pet. App. A, 9). The Court further held that "the conclusions of the Board in this case are reconcilable with the statutory directions" and "that the Board should have authority to distinguish between the services of a broker and those of a freight forwarder" (Pet. App. A. 11, 12) and found that under the circumstances in this case, Section 16 would have been violated had reparation been awarded.

AUT contends that the Board's reasoning was wrong as well as that of the Court below. Apparently, although

it is not entirely clear, it contends that the Board lacks jurisdiction to determine that reparation should not be awarded AUT because AUT's conduct was not knowing and wilful within the meaning of Section 16 of the Shipping Act.

The acts of AUT in this case were knowing and wilful. It deliberately sought payment for services rendered the Central Railroad from the steamship carriers. In addition on each of the brokerage bills AUT made the following certification:

> "In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee * * *". (R. 177-179).

AUT presented brokerage bills for payment to the various carriers having the above certification on them even though the consignee, the Central Railroad of Brazil, would be thus obtaining the benefit of at least part of the brokerage inasmuch as AUT planned to obtain payment for its forwarding services in this manner. By this certification AUT deliberately misrepresented the facts to the steamship carriers. Such conduct was certainly knowing and wilful.

The proper meaning of the words "knowingly and wilfully" in Section 16 of the Shipping Act is set forth in the decision of the Federal Maritime Board in *Misclassification of Tissue Paper*, 4 F. M. B. 483.

> "We believe, following the authority cited by Public Counsel, the phrase 'knowingly and wilfully' means purposely or obstinately or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements.

> We agree a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper forwarder was acting knowingly and wilfully in violation of the Act. Diligent inquiry must be exercised by shippers and forwarders in order to measure up to standards set up by the Act. Indifference on the part of such persons is tantamount to outright active violation."

AUT certainly knew what it was doing. There was no question of lack of knowledge. Its acts were "knowingly and wilfully" done.

Petitioner cites the decision of the Board in *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556, which concerned an interpretation of Section 16, Second, of the Shipping Act, 1916. This section applies to steamship carriers and is not applicable to brokers or forwarders.

The Board found AUT's conduct violated the first paragraph of Section 16 which provides "that it shall be unlawful for any * * * consignee, forwarder, broker, * * * knowlingly and wilfully, directly or indirectly, * * * by any * * * unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable". In 1936 this language was added to Section 16 of the Shipping Act to make illegal specified practices engaged in by shippers, consignees, consignors, forwarders and brokers. (H. R. Report No. 2598 to accompany S-3467, 74 Cong. 2d Sess.) The language of this paragraph is broader than that of Section 16, Second, because attempting, as well as obtaining, by indirect as well as direct means, transportation of property by unfair device or means at less than the rates or charges which would otherwise be applicable is illegal. Petitioner's contention that this language was not intended by Congress to interfere with the right to "legiti-

mate brokerage" does not support petitioner's position since the brokerage being sought would not be legitimate because payment would constitute an indirect rebate in violation of the Act.

B. The Federal Maritime Board Was Correct in Holding That Petitioner Had Not Earned Brokerage.

It stands admitted that American Union Transport attempted to obtain the business of carrying these locomotives to Brazil and when it was unsuccessful in doing so, induced the Central Railroad to appoint it freight forwarder for the shipments. (R. 95, R. 154, R. 155). Thus the Conference lines had already secured the business by the time AUT sought to enter the transaction as a broker. As the Court of Appeals said:

> "It is perfectly obvious that AUT performed no services as a broker in the ordinary sense of the term 'broker', i.e., securing cargo. Far from obtaining the cargo for the Conference, AUT was in direct conflict with the Conference, and under no stretch of the imagination could it be said that AUT earned any compensation whatsoever as a broker.
>
> * * * * * *
>
> "It seems clear, as the Board held, that the other functions performed by AUT could not be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers and that the duty to bring the locomotives alongside the vessel ready for shipment is a duty of the shipper, not of the ship, and was ordinary freight forwarder service.
>
> * * * * * *
>
> "The appointment of AUT as a broker by Central could not create any liability on the part of the

> ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparation. AUT was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage. Everything is to the contrary and AUT was promptly put on notice that the carriers would not pay. Nevertheless, having this notice, AUT elected to proceed. It did so at its own risk. It seems clear also that the selection of the carriers was made by Central and not AUT, as Central reserved the right to designate the carrier".

The Federal Maritime Board and its predecessors have always recognized the right of individual steamship lines to make their own determination as to whether they would pay brokerage. This principle was set forth in *Agreements and Practices re Brokerage;* 3 U. S. M. C. 170, in the following language:

> "Nothing herein is to be construed as a directive that individual carriers must pay brokerage nor as any limitation as to the amount of brokerage that may be paid by such individual carriers, provided the payments do not result in violations of applicable statutes. *A carrier should be free within limits to pay brokerage or not as its individual managerial discretion dictates.*" (Emphasis added).

Lloyd Brasileiro individually determined not to pay brokerage to AUT and Lloyd carried most of the locomotives. The Conference agreement and tariff rule permit member lines to pay brokerage when earned at their discretion and the payment of brokerage is not mandatory. In

fact $7,330.41 of the $11,647.12 being sought by petitioner is the brokerage on shipments carried by Lloyd Brasileiro.

By letter on June 11, 1952, AUT notified Lloyd Brasileiro that the first two locomotives would be ready to be shipped, and notified the steamship company that it expected to be paid brokerage at the rate of 1¼% of the freight (R. 162, 163). Lloyd Brasileiro immediately replied that brokerage would not be paid because both Lloyd Brasileiro and the Central Railroad of Brazil were departments of the Government of Brazil and not permitted to pay brokerage on these shipments consigned to a Brazilian Government department. (R. 115-118). This action of Lloyd Brasileiro was taken prior to and independent of the Conference action determining not to pay brokerage and, as the Court of Appeals said, "there is no evidence justifying the claim that Lloyd as a matter of fact took this action as a result of the June 12, 1952 meeting. In fact the evidence is to the contrary."

Under Section 22 of the Shipping Act, the section under which AUT seeks reparation, there must be a showing of actual injury as a result of a violation of the Shipping Act before the Board can properly award reparation. The Federal Maritime Board and its predecessor have consistently refused to award reparation where there was no actual showing of injury, even though a violation of the Shipping Act has been established. *Sun Maid Raisin Growers Association v. Blue Star Line Ltd.*, 2 U. S. M. C. 31, 38; *J. G. Boswell Co. v. American Hawaiian S. S. Co.*, 2 U. S. M. C. 95, 104, 105.

The interpretation placed on the Shipping Act, 1916, by the Federal Maritime Board is in accord with the interpretation placed upon the reparation section of the Interstate Commerce Act by this Court in *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 165. In that case it was held that under

Section 8 of the Interstate Commerce Act, before reparation could be awarded, it was necessary to establish that as a result of the carrier's act "damages in some amount susceptible of expression in figures resulted".

Before recovery can be had by AUT, it must show that it was deprived of something that to which it had a legal right. In its decision the Court of Appeals said "injury must be shown before recovery can be had; AUT having had no right to brokerage, suffered no damage by the action complained of".

C. The Board's Decision Was Procedurally Correct

AUT argues that the Board denied it a hearing on the issue of the legality of its contract. Petitioner in this case sought reparation under Section 22 of the Shipping Act, 1916. The Federal Maritime Board has no jurisdiction to award reparation if in so doing violation of another provision of the Act would result. The Board in its decision stated that "even if brokerage was otherwise recoverable we would not order it paid where such payment would countenance a violation of Section 16 of the Act and thus be illegal". (R. 12). The Court of Appeals affirmed the Board's decision in the following language:

> "We are of the opinion also that there is no merit in appellant's claim that the Board's decision and order are procedurally invalid. If the Board held, as it did, that the collection of brokerage, so-called, under the circumstances of this case, would violate Section 16, the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not. In addition, we are unable to say that the issue in question was not called to the attention of the Board."

Section 22 of the Shipping Act provides that "if the complaint is not satisfied the Board shall, except as otherwise provided in this Act, investigate it in such manner by such means, and make such order as it deems proper." Under this section the Board's authority to act is expressly made dependent upon the other provisions of the Shipping Act. Further Section 22 provides "the Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violations of this Act." This latter part of Section 22 specifically provides that the Board, on its own motion may investigate any violations of the Act. It is anomalous for petitioner to suggest that the Board is estopped from considering whether its conduct met the standards set forth in other sections of the Shipping Act when petitioner seeks to have the Board exercise its jurisdiction and award it relief under the Shipping Act. It is familiar law that a court or an administrative body can at any time examine into the question of lack of jurisdiction even though the parties may not have formally raised the question.

AUT's argument appears to be that because the Conference did not affirmatively allege in its answer in the proceedings before the Federal Maritime Board, that the payment of brokerage in this case would constitute a violation of the Shipping Act, the Board had no right to make such a decision. There is no doubt, however, that it was apparent to the petitioner that this issue was involved in the proceedings. For example, in the Demand for a Bill of Particulars directed to AUT by the Conference, the question was asked whether AUT had waived the collection of a forwarding fee from the consignee and this question was answered by AUT in the affirmative. Again during the hearing before the Examiner the president of AUT on

cross examination was asked whether AUT had waived a forwarding fee and sought to be compensated for its services by the steamship lines (R. 97, 98). In connection with the submission of proposed findings of fact and conclusion of law to the Examiner, the Conference pointed out that if the Board were to award reparation to AUT, it would result in violation of section 16 of the Shipping Act (R. 213-216). Following rendition of the Examiner's report, the Conference filed exceptions thereto and pointed out what the legal effect of waiving of the forwarding fee in this case was (R. 217-219). AUT in its reply to the exceptions filed by the Conference, discussed this point (R. 221). In oral argument before the Federal Maritime Board, on exceptions to the Examiner's report, the issue concerning the waiving of the forwarding fee and its legal implications, was discussed (R. 222-224). There is no question but what AUT waived the collection of a forwarding fee and sought to be paid for the services rendered to the consignee by collecting brokerage from the steamship lines. AUT has had ample opportunity to argue what the legal effect of these facts were. Thus under the circumstances there is no question that AUT has not been denied a hearing on the issue of illegality despite its protestations to the contrary.

Petitioner's contention that the Board engaged in retroactive rule making loses sight of the nature of this case. The Federal Maritime Board was not engaged in rule making as petitioner contends, but found it necessary to interpret the Shipping Act in order to pass on petitioner's claim for reparation. Although the question of whether brokerage could be collected when a forwarding fee has been waived had not previously been determined by the Board, there is nothing uncommon in a court decision for example, having future effect. Petitioner's contention that the Board's decision in *Agreements and Practices re Broker-*

age, 3 U. S. M. C. 170 is to the contrary is incorrect. The issue was not passed on in that proceeding. The mere fact that an adjudication by the Federal Maritime Board involved an interpretation of the Shipping Act does not change the nature of the proceeding from an adjudication to that of rule makihg under the Administrative Procedure Act (5 U. S. C. 1001 etc.).

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 8, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

AMERICAN UNION TRANSPORT, INC., PETITIONER,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME BOARD IN OPPOSITION

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BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME BOARD IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A-1–A-12) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1958 (Pet. App. A-13), and the petition for a writ of certiorari was filed on July 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Maritime Board refused to award reparations to a freight forwarder covering "brokerage".

claims against ocean carriers. The questions presented are:

1. Whether the Board correctly held that, since the services for which "brokerage" was sought were not rendered for the carriers but for the consignee, payment of brokerage therefor by the carriers would constitute an indirect rebate to the consignee which was prohibited by Section 16 of the Shipping Act, 1916.

2. Whether the Board correctly concluded, as an additional basis for denying reparations, that the freight forwarder had not earned brokerage because the services which it performed were not those of a broker (*i.e.*, obtaining cargo for the ship) but those of a freight forwarder.

STATUTE INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801, *et seq.*, are set forth in the Appendix, *infra*, pages 13-16.

STATEMENT

Petitioner is a freight forwarder, a broker, an owner, and charterer of vessels, and a water carrier (Pet. App. B-3).[1] Early in 1952, the Estrado de Ferro Central do Brazil ("Central"), an instrumentality of the Bra-

[1] A broker acts as the carrier's agent in obtaining cargo for the carrier, as compensation for which it receives a percentage of the freight charges, called "brokerage." *American Union Transport, Inc.* v. *Italian Line*, 2 U.S.M.C. 553, 553-554. A freight forwarder, acting as agent for the shipper or consignee, arranges for bringing the cargo to the ship, prepares export documents, and renders other services in connection with the shipment. See *United States* v. *American Union Transport*, 327 U.S. 437, 442-443. The same person frequently may act as broker for one principal and as freight forwarder for another with respect to the same transaction. *Gulf Brokerage and Forwarding Agreements*, 1 U.S.S.B.B. 533.

zilian government, purchased 120 locomotives and spare parts therefor from manufacturers in the United States (*id.*, B-4). Both petitioner and the River Plate and Brazil Conferences (the "conference") attempted to secure the business of transporting the locomotives (*ibid.*). Central selected the conference, and designated Lloyd-Brasiliero, one of the conference lines and also an instrumentality of the Brazilian government, to carry the locomotives (*id.*, B-4–B-9). At the same time, Central designated petitioner as "brokers in charge of negotiations and arrangements in connection with these shipments by Lloyd Brasiliero or another member of the Conference, *without any charge to Central*" (J.A. 155, emphasis added).[2] Petitioner admittedly expected to secure its compensation for these services by obtaining brokerage payments from the steamship lines (J.A. 98).

Pursuant to its agreement with Central, petitioner performed sundry services in connection with the shipments. It arranged overland transportation to shipside, coordinated manufacturer's delivery dates with steamer sailings, procured consular invoices, customs declarations and export permits, reserved space, booked cargo, prepared bills of lading, and advised Central when to expect incoming shipments (Pet. App. B-7, B-13).

Seventy-six of the locomotives were shipped from New York, all on vessels of Lloyd Brasiliero (Pet. App. B-7; J.A. 60-61). When the first locomotives were ready for shipment, petitioner on June 11, 1952 advised Lloyd Brasiliero that payment of brokerage by the latter to petitioner at 1¼ percent of the ocean freight

[2] "J.A." refers to the joint appendix in the Court of Appeals.

would be expected (Ex. 16, J.A. 162-163). Lloyd Brasiliero replied the following day that it would not pay brokerage on shipments to another Brazilian government agency (Ex. 17, J.A. 164). Petitioner nevertheless continued to perform the freight forwarding services for Central on all shipments via Lloyd Brasiliero (Pet. App. B-7). The other 44 locomotives were shipped from Montreal, Canada, on vessels of other conference lines (Pet. App. B-7; J.A. 60-61).

On June 12, 1952, the conference held a special joint executive meeting to determine whether brokerage should be paid to petitioner on the locomotives "[i]n view of the fact that * * * [petitioner] negotiated for these locomotives as a competitor carrier * * *" (Pet. App. B-6). At the meeting, the conference voted "that no brokerage be paid on the 120 locomotives" (*ibid.*). Petitioner learned of this action shortly thereafter (Pet. App. A-5-6; J.A. 110-111). Petitioner's bills for brokerage to one of the conference lines (Moore-McCormack Lines) were returned unpaid on October 14, 1952 "with the explanation that the line could not pay it due to the Conference action of June 12, 1952" (Pet. App. B-6).

After unsuccessful attempts to collect brokerage from the carriers,[3] petitioner filed a complaint with the Federal Maritime Board under Section 22 of the Shipping Act, 1916, seeking reparations of $11,647.11 for

[3] After the carriers had refused to pay brokerage, petitioner filed a private antitrust action against the conference and its member lines, alleging that the conference action of June 12, 1952 violated the Sherman Act. The District Court dismissed the suit on the ground that the claim was within the Board's exclusive jurisdiction. *American Union Transport, Inc. v. River Plate and Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y.), affirmed, 222 F. 2d 369 (C.A. 2). The proceeding before the Board followed.

the amount of brokerage allegedly denied petitioner as a result of the conference action (Pet. App. A-6-A-7). Petitioner contended that the conference agreement of June 12, 1952 not to pay it brokerage was illegal under Section 15 of the Shipping Act, 1916, because it had not been approved by the Board (*ibid.*).

After full administrative proceedings, the Board denied reparations. The Board ruled that the conference agreement of June 12, 1952 "amounted to a new course of conduct for its members in relation to the payment of brokerage, *i.e.*, it prohibited the payment of brokerage regarding specified shipments"; and that it therefore constituted "a modification of an existing agreement which, because it was calculated to control, regulate, prevent, or destroy competition, and provided for an exclusive, preferential, or cooperative working arrangement, was required to be filed under section 15 of the Act with the Board for approval prior to its effectuation" (Pet. App. B-9–B-10). The Board further held, however, that petitioner was not entitled to reparations. It ruled that the services for which petitioner was claiming brokerage were in fact "freight forwarding services for the consignee [which petitioner performed] without compensation therefor [by the consignee]"; and that the collection of such freight forwarding fee "from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore [was] an 'unjust or unfair device or means'" which was prohibited by Section 16 of the Shipping Act, 1916 (*id.*, B-11–B-12). The Board stated (*id.*, B-12) that "[e]ven if brokerage was otherwise recoverable we

would not order it paid where such payment would countenance a violation of section 16 of the Act and thus be illegal."

The Board also held (*ibid.*) that "brokerage could not be recovered here, section 16 notwithstanding, simply because brokerage was not earned." It stated (*ibid.*) that brokerage is "securing cargo for the ship"; and that "[c]learly, on this record, AUT did not secure the cargo for the ship. On the contrary, it is apparent that the transportation was sold directly by the Conference to Central, and that Central reserved to itself the right to select the individual carrier in every instance." It pointed out (*id.*, B-13) that, except for preparing bills of lading, all of the other services performed by petitioner were "ordinary freight forwarder services," and not services which otherwise "would be performed by the carriers."

The Court of Appeals unanimously affirmed the Board's order. The court stated (Pet. App. A-9) that it was "perfectly obvious" that petitioner "performed no services as a broker in the ordinary sense of the term 'broker,' *i.e.*, securing cargo * * * for the Conference," but on the contrary petitioner was "in direct conflict" with the conference in seeking the cargo. The court ruled (*ibid.*) that "except in a few minor details the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted." It noted (*id.*, A-11) that Central's appointment of petitioner as its broker "could not create any liability on the part of the ocean carriers"; and that there was no agreement by the conference to incur liability to petitioner, "with whom it had engaged in competition for

the very business for which it [petitioner] now claims compensation by way of reparations," for "ordinary freight forwarder service" (*id.*, A-10). The court stated (*id.*, A-12) that, "even in the case of violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of." The court also held (*id.*, A-12) that there was "no merit" to petitioner's claim that the Board's proceedings were "procedurally invalid."

ARGUMENT

1. Section 16 of the Shipping Act, 1916, makes it unlawful for any "consignee, forwarder, broker, * * *, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, *or by any other unjust or unfair device or means* to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable" (emphasis added). We submit that the court below correctly upheld the Board's ruling that permitting petitioner to collect "brokerage" from conference members for the services which it rendered in this case would constitute an indirect rebate in violation of Section 16.

As the Board correctly found (Pet. App. B-15), all of the services which petitioner provided (with one minor exception) were "ordinary freight forwarder services" whose performance was the duty of the shipper, not of the carrier. Petitioner, however, undertook to perform these services for the consignee without charge, and to look to the carriers for compensation. Had petitioner not provided such services,

Central (and not the carriers) would have been obligated to perform them at its own expense. Thus, the effect of petitioner's "waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means' " (*id.*, B-12). Since payment of such "brokerage" by the conference to petitioner would have been illegal, the Board properly refused to award reparations therefor. *Keogh* v. *C. & N. W. Ry. Co.*, 260 U.S. 156.

Petitioner contends (Pet. 12) that Section 16 is "simply intended to prevent shippers, consignees, and their representatives from cheating carriers through specified types of fraudulent conduct," and that payment of "brokerage" by the conference would not violate that section because petitioner "perpetrated no fraud whatever" (*id.*, 13). But the prohibition in Section 16 against "any other unjust or unfair device or means to obtain * * * transportation by water for property at less than the rates or charges which would otherwise be applicable" is not limited to fraudulent devices or means. The legislative history of this provision shows that it was designed "to prohibit false billing *and other practices* sometimes employed in attempts to obtain transportation by water at less than regular rates or to secure allowances or refunds in connection with such transportation." H. Rep. No. 2398, 74th Cong., 2d Sess., p. 2 (emphasis added). A device which results in carriers' paying for services which a consignee otherwise would be required to provide obvi-

ously results in the consignee's obtain[ing] transportation by water * * * at less than the rates or charges which would otherwise be applicable."[4]

2. The court below also correctly held that the Board properly denied reparations because petitioner had not earned brokerage. Section 22 of the Shipping Act, 1916, authorizes the Board to award reparations where the Act has been violated only "for the injury caused by such violation." As the Board consistently has held, the service for which the carrier pays brokerage is the securing of cargo for the ship. *Pacific Westbound Conference Agreement*, 2 U.S.M.C. 775, 780 (1946); *American Union Transport, Inc.* v. *Italian Line*, 2 U.S.M.C. 553, 557 (1941); *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 172 (1949). As both the Board (Pet. App. B-12) and the court below (*id.*, A-9) correctly held, petitioner did not secure the cargo for the conference. On the contrary, the conference itself obtained the cargo directly from the consignee, and petitioner was competing against the conference in trying to obtain the business for itself. The court below pointed out (*id.*, A-11) that petitioner's appointment "as a broker by Central could not create any liability on the part of the ocean carriers. * * * [Petitioner] was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage." Since substantially all of

[4] Petitioner's reliance (Pet. 13) on a statement in the House Committee Report that this provision was not intended "to prohibit the payment by carriers of legitimate brokerage" is beside the point. Payment by carriers for freight forwarder services which are rendered for the benefit of the consignee cannot be deemed to constitute "legitimate brokerage." See *infra*, pp. 9-12.

the services for which petitioner sought brokerage were performed for the benefit of the consignee, and not of the carriers, petitioner did not earn any brokerage for which it had a valid claim against the carriers.

Petitioner contends (Pet. 16), however, that it "would have received brokerage if the Conference had not restrained its members from paying it," and that the Board and court were "rationally obligated to make the ultimate finding that the [alleged] conspiracy [by the conference not to pay brokerage] injured the petitioner to an extent measured by the lost brokerage" (*id.*, 15).[5] But if the conference members had paid petitioner "brokerage" for the freight forwarder services which it rendered, such payments also would have constituted an indirect illegal rebate in violation of Section 16 (see *supra*, pp. 7-9). Petitioner cannot complain because, as a result of an illegal agreement by the conference, it was denied brokerage which it had not earned and to which, therefore, it had no valid claim. As the court below stated (Pet. App. A-12), "even in the case of a violation of § 15, injury must be shown before a recovery can be had; AUT having had no right to brokerage, it suffered no damage by the action complained of."

Contrary to petitioner's contention (Pet. 8-10), the decision below is not in conflict in any way with *Federal Maritime Board* v. *Isbrandtsen Company*, 356 U.S. 481. The question in the *Isbrandtsen* case was the legality of a dual-rate system under Section 14 Third

[5] At best, this argument is applicable only to the 44 locomotives that moved from Canada on carriers other than Lloyd Brasiliero. The record is clear that the latter refused to pay brokerage for the 76 locomotives which it shipped, not because of the action of the conference, but because it would not pay brokerage on shipments to another agency of the Brazilian government. See *supra*, p. 4.

of the Shipping Act, 1916. The Court held that the system was illegal and that the Board, therefore, could not approve it under Section 15. In the instant case, however, the Board held that the conference agreement not to pay brokerage was illegal because it had not been approved by the Board. The question here is whether that holding automatically entitled petitioner to recover "brokerage" from the conference, even though such brokerage had not been earned and its payment would have involved an illegal indirect rebate.[6] The

[6] Petitioner also challenges the Board's order on two procedural grounds, neither of which has merit.

1. Petitioner contends (Pet. 17-19) that it was not given notice that the legality of brokerage payments under Section 16 was in issue in the case. But when petitioner invoked the Board's jurisdiction by filing the complaint, it necessarily was on notice that any defenses involving the validity of its claim would be at issue. Furthermore, petitioner had actual notice during the course of the proceedings that the conference was challenging the legality of brokerage payments to it. The point was argued by the conference in its brief to the examiner (J.A. 213-216), discussed in the examiner's decision (J.A. 68), argued by the conference in its exceptions thereto (J.A. 217, 220), argued by petitioner itself in its reply to those exceptions (J.A. 221), and discussed by the conference during oral argument before the Board (J.A. 222). Such actual notice was sufficient. *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572; *City of Dallas* v. *Civil Aeronautics Board*, 221 F. 2d 501 (C.A.D.C.), certiorari denied, 348 U.S. 914.

2. Petitioner urges (Pet. 19-21) that, since the Board previously had held that "payment of brokerage by the carrier is not a payment to a shipper" (see Pet. 19), the Board's action in this case constituted a retroactive application of a new rule which had not been promulgated in accordance with the rule-making standards of the Administrative Procedure Act. But the Board decisions upon which petitioner relies involved payment of brokerage "in return for services to the carrier" (see *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170, 175) and not, as in the instant case, payments for services rendered to the consignee. The Board has never approved payments of brokerage by carriers to freight forwarders for freight forwarding services rendered for the consignee. In any event, an agency is not precluded from enunciating a new principle in adjudicatory rather than in rule-making proceedings.

court below answered that question in the negative. The correctness of that ruling involves only the application of settled principles under the Shipping Act, 1916, to the particular facts of this case, and presents no question of general importance calling for further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

Pertinent provision of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801, *et seq.*, are as follows:

Section 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Federal Maritime Board a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in viola-

tion of this chapter, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the Board shall be lawful until disapproved by the Board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the Board.

All agreements, modifications, or cancellations made after the organization of the commission shall be lawful only when and as long as approved by the Board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action. [46 U.S.C. 814]

Section 16. It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense. [46 U.S.C. 815]

Section 22. Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter,

investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation. * * * [46 U.S.C. 821]